SERVICE AS A REQUIREMENT OF DUE PROCESS IN ACTIONS IN PERSONAM

A PRIME requisite of due process is, of course, that the court shall have jurisdiction of the subject-matter. "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."[1] In proceedings *in personam*—proceedings to determine the personal liability of the defendant, no property being brought by the proceedings within the control of the court—the court must also have jurisdiction of the defendant. Attempts have repeatedly been made to take jurisdiction of non-resident defendants through service by publication or through personal service made outside of the state in which the action is brought. The Supreme Court has held that such procedure does not give jurisdiction of the non-resident, for a state cannot in that way extend its jurisdiction beyond its territorial limits. The defendant "must be brought within its jurisdiction by service of process in the State, or by his voluntary appearance."[2]

Since a state may exclude a foreign corporation (except when it desires to engage in interstate commerce, or to act in the state for the Federal government)[3] it may compel such corporation as a condition of entrance to appoint an agent in the state upon whom service may be made, and such service will give jurisdiction.[4] The statute may, however, simply provide that if a corporation does business in the state, service may be made upon one of its agents in the state, or upon a state officer. Such statutes have been upheld either upon the theory of implied consent to such service,[5] or upon the theory that the corporation, having voluntarily come into the state to do business there, is bound by the state's reasonable regulations

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[1] Pennoyer v. Neff, 95 U. S. 714, 733.

[2] *Ibid.;* Harkness v. Hyde, 98 U. S. 476; Wilson v. Seligman, 144 U. S. 41; Riverside and Dan River Cotton Mills v. Menefee, 237 U. S. 189.

[3] Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Hooper v. California, 155 U. S. 648.

[4] Pennsylvania F. Ins. Co. v. Gold Issue Mining and Milling Co., 243 U. S. 93.

[5] Lafayette Ins. Co. v. French, 18 Howard (U. S.) 404.

of such business.[6] It has also been held that to require a corporation engaged in interstate commerce to appoint an agent upon whom service may be made in controversies arising within the state is not an unreasonable burden upon interstate commerce;[7] but, if the statute attempts to compel such a corporation to subject itself to the jurisdiction of the state courts in all controversies wherever arising, this would probably be held to burden interstate commerce unreasonably.[8]

Under the "privileges and immunities" clause of Article Four of the Constitution a natural person, a citizen of one of the states, cannot be excluded from doing business in any other state.[9] A Kentucky statute provides that "in actions against an individual residing in another State * * * engaged in business in this State, a summons may be served upon the manager, or agent of, or person in charge of, such business in this State, in the County where the business is carried on, or in the County where the cause of action occurred."[10] Upon a cause of action which arose in Kentucky, an action was brought against non-resident partners who had done business in Kentucky through W. Flexner as their agent, process being served upon W. Flexner, who at the time of the service had ceased to be such agent. Judgment was obtained in Kentucky and sued upon in Illinois, where the court gave judgment for the defendant, which was affirmed by the supreme court of the state.[11] The case was taken to the Supreme Court of the United States on the ground that full faith and credit was not given to the Kentucky judgment. Justice Holmes in his brief opinion, affirming the judgment of the Illinois court, said:[12]

> "It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction

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[6] Smolik v. Philadelphia and R. Coal and Iron Co., 222 Fed. 148, approved in Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co., 243 U. S. 93.

[7] International Harvester Co. v. Kentucky, 234 U. S. 579.

[8] See Sioux Remedy Co. v. Cope, 235 U. S. 197.

[9] Ward v. Maryland, 12 Wallace (U. S.) 418, 430; Blake v. McClung, 172 U. S. 239.

[10] Kentucky Civil Code, sec. 51 (6).

[11] Flexner v. Farson, 268 Ill. 435.

[12] Flexner v. Farson, 248 U. S. 289.

sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association* v. *Phelps,* 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co.* v. *French,* 18 How. 404. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining and Milling Co.,* 243 U. S. 93, 96. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Insurance Co.* v. *Dunlevy,* 241 U. S. 518, 522, 523."

Probably the justifiable deduction from this opinion is that, in the case of a natural person, a citizen of another state, no service will give jurisdiction, except personal service within the state or voluntary appearance, unless actually consented to by the defendant. Yet we have seen that a reasonable regulation as to service of process upon a foreign corporation entering to engage in interstate commerce may be imposed, though the corporation cannot be excluded from the state. Similarly, a regulation as to natural persons entering to do business within the state, providing for service of process upon an agent in the state where a cause of action arises within the state, would seem not to deny such persons any privilege or immunity of citizens of the state, but rather to put them on an equal footing with such citizens. In *Kane* v. *New Jersey*[13] a state statute requiring that a non-resident automobile owner should, before operating his car in the state, appoint the Secretary of State

[13] 242 U. S. 160.

his agent upon whom process might be served in any action arising out of the operation of his car in the state, was held constitutional. It is possible that *Flexner* v. *Farson* will be ultimately held to stand only for the proposition that there was no jurisdiction of the defendants because W. Flexner was, at the time of service, no longer their agent.[14]

A resident of one of the states of the Union who is a citizen of the United States is also a citizen of the state in which he resides.[15] But a person may also, of course, be domiciled in a state who is a citizen of a foreign country. Whether a person is a citizen of the state or not, the state clearly may authorize its courts to take jurisdiction of him when he is within the state. By the common law, jurisdiction in a proceeding *in personam* was acquired by personal service upon the defendant within the jurisdiction; if he could not be found, pressure was brought upon him to appear by proceedings in outlawry.[16] "One thing our law would not do, the obvious thing. It would exhaust its terrors in the endeavor to make the defendant appear, but it would not give judgment against him until he had appeared. * * * Instead of saying to the defaulter, 'I don't care whether you appear or no,' it set its will against his will: 'But you shall appear.' "[17] The practice, however, has been very generally adopted by our state legislatures of allowing substituted service of process, by leaving it at the defendant's residence, or of allowing constructive service by publication, in cases where the defendant cannot be found and personally served. It is believed that substituted service has been held due process and to give the court jurisdiction, where the defendant is domiciled in and is actually within the state, in all cases where the constitutional question has been considered in the state courts. Such service is treated as on the same footing with personal service.[18] The verdict of the state

[14] For a very interesting discussion of this subject, see Scott, "Jurisdiction over Nonresidents Doing Business within a State," 32 HARV. L. REV. 871, to which the writer acknowledges his indebtedness in connection with the preceding part of the discussion.

[15] Const. of U. S., Amend. XIV, Sec. 1.

[16] 3 Black. Comm. 283.

[17] Perry, Common-law Pleading, 151.

[18] Bimeler v. Dawson, 5 Ill. 536; Biesenthall v. Williams, 1 Duv. (Ky.) 329; Cassidy v. Leitch, 2 Abb. N. C. (N. Y.) 315; Continental Nat. Bk. v.

courts is also that constructive service by publication is due process and gives the court jurisdiction as against a defendant domiciled in and actually within the state, on the ground that such a person owes obedience to the laws of the state, and the state has a right to prescribe by law how he shall be brought into its courts, as long as the methods used are reasonably probable to apprise him of the proceedings,[19] although it is very reasonably insisted in one case that such service is not due process except when it appears that defendant could not be found within the jurisdiction and personally served.[20]

It is not easy to determine the position of the Supreme Court of the United States with regard to the validity of substituted service and of constructive service by publication upon persons domiciled in and actually within the state, in actions *in personam*. In *Webster* v. *Reid*[21] commissioners appointed to partition certain Indian lands sued the owners and had process served by publication according to the laws of the territory. The Supreme Court held the judgment void, declaring that the "suits were not a proceeding *in rem* against the land but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is

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Thurber, 74 Hun. (N. Y.) 632, affirmed on opinion below in 143 N. Y. 648; Bernhardt v. Brown, 118 N. C. 700; Bryant v. Shute's Ex'r., 147 Ky. 268, and cases cited at p. 275 of the opinion.

[19] Holt v. Alloway, 2 Blackf. (Ind.) 108; Welch v. Sykes, 8 Ill. 197; Matter of Empire City Bk., 18 N. Y. 199; Harryman & Schryver v. Roberts, 52 Md. 64; Betancourt v. Eberlin, 71 Ala. 461 (action commenced by attachment treated as an action *in personam*); Bardwell v. Collins, 44 Minn. 97 (foreclosure action treated as action *in personam*). In Bickerdike v. Allen, 157 Ill. 95, the court held that in an action *in personam* service by publication is not sufficient, but that if process is also mailed to defendant's residence this is *prima facie* evidence that he received it, and therefore such service is *prima facie* valid.

"That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citations of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose." Roller v. Holly, 176 U. S. 398, 409.

[20] Bardwell v. Collins, 44 Minn. 97.

[21] (1850) 11 Howard 437.

it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land until after the judgments. The judgments therefore are mere nullities and did not authorize the executions on which the land was sold." This seems a pretty explicit decision against service by publication in an action strictly personal, whether the defendant is a resident within the state or not. In *Knowles* v. *Gaslight & Coke Company*[22] the court said, merely by way of *dictum:* "We do not mean to say that personal service is in all cases necessary to enable a citizen to acquire jurisdiction of the person. When the defendant resides in the State in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the law of the State." In *Earle* v. *McVeigh*[23] the court had before it a case where service was attempted by posting on the door of defendant's former residence, he having been seven months out of the state. The court held that the house in question was not defendant's "usual place of abode" as required by the state statute, and that the service was, therefore, invalid. But the court said, "Doubtless constructive notice may be sufficient in certain cases," and apparently approved of service at the actual place of residence of one domiciled in the state. The next case is that of *Pennoyer* v. *Neff*,[24] in which the action was against a non-resident and in which service by publication was held insufficient. The court's discussion is directed to the question before it, but it quotes with approval the statement quoted above from *Webster* v. *Reid* and declares in general language that in an action *in personam* the defendant "must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."[25] The next year the Supreme Court had before it a case where the action was one *in personam,* and in which process was served by leaving it at defendant's residence with his wife. A state statute authorized such service if defendant could not be found. There was no averment in the sheriff's return that he could not

[22] (1873) 19 Wallace 58, 61.
[23] (1875) 91 U. S. 503.
[24] (1877) 95 U. S. 714.
[25] *Ibid.* 733.

find defendant. For this reason the judgment was held void. The court said, "Substitute service in actions purely *in personam* was a departure from the rule of the common law, and the authority for it, if it could be allowed at all, must have been strictly followed."[26] In *Harkness* v. *Hyde*,[27] it appeared that in an action *in personam* process out of a court of Idaho territory was served personally upon the defendant at his residence on an Indian reservation. The reservation was, by treaty with the Indians and by legislation, put outside of the jurisdiction of the territory of Idaho. It was held that the service was invalid and the resulting judgment therefore void. The court said:[28]

> There can be no jurisdiction in a court of a territory to render a personal judgment against any one upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of *Pennoyer* v. *Neff* (95 U. S. 714) and it is unnecessary to repeat them here.

The fair deduction from these expressions of opinion by the Supreme Court would seem to be that the court does not consider service by publication to be due process in an action strictly *in personam* even though the defendant be domiciled in and be actually within the state from whose court the process issues. This point seems to be actually involved in the decision in *Webster* v. *Reid*. *Harkness* v. *Hyde* had to do with a non-resident, but the statement in the case as quoted above is very strong to the effect that personal service within the state or voluntary appearance is always necessary. In *Knowles* v. *Gaslight & Coke Company* and in *Earle* v.

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[26] Settlemier v. Sullivan (1878), 97 U. S. 444, 447.

[27] (1878) 98 U. S. 476.

[28] *Ibid.* 478.

McVeigh where a broader view is intimated the court may have had actions *in rem* in mind. It is impossible to say whether the court would be influenced by the more liberal view of the state courts, if the question were now brought before it.[29] It is believed, however, that service by publication may without unreasonable hardship to plaintiffs be restricted to actions *in rem,* which include actions commenced by attachment. Substituted service where process is left at the residence of the defendant, stands on a different footing. It is treated by the state courts, not as distinct from, but as a kind of personal service. It is believed that the Supreme Court would probably take the same position in view of the expressions by that court quoted above, and particularly in view of the suggestion to be dealt with shortly which was thrown out in the recent case of *McDonald* v. *Mabee,*[30] that substituted service may be good even upon a resident defendant when out of the state.

When a person is domiciled in a state but is temporarily outside of the state at the time of service of process in an action *in personam* two questions are raised—has the state authority over such person, and if so what means of service constitute due process? It has been held that a court of a state may only be given jurisdiction over those actually within the state—that an attempt to give to a court jurisdiction of a person who, though domiciled within the state, is actually outside of the state, is an attempt to invade the sovereignty of the state where he is.[31] However, the weight of authority in state courts seems to be on the other side. The theory is that a person domiciled in a state or country "owes allegiance to the country and submission to its laws. * * * By reason of the rela-

[29] In the recent case of McDonald v. Mabee (1917), 243 U. S. 90, the court refused to express any opinion on this point.

[30] 243 U. S. 90.

[31] De La Montanya v. De La Montanya, 112 Calif. 101, three judges dissenting. Similar declarations are found in Amsbaugh v. Exchange Bk., 33 Kan. 100, though there it seems that the service was not at defendant's "usual place of residence," as required by the statute, and in Smith v. Grady, 68 Wis. 215, though that case involved an action brought in Ontario against one who, though a British subject, was not a resident of Ontario and was served personally outside of Ontario. It is not clear whether Moss v. Fitch, 212 Mo. 484, and Raher v. Raher, 150 Ia. 511, were meant to support the same proposition, or were meant only to determine that the methods of service there adopted were invalid.

tion between the State and its citizen, which affords protection to him and his property and imposes upon him duties as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the State prescribing a method of service which is not personal and which may not become *actual* notice to him. And this may be accomplished in his lawful absence from the State. It, therefore, becomes important to inquire whether the State of Wisconsin was the domicile of the defendant at the time the constructive service was made there, because it is upon domicile that his civil status depends."[32] Three methods of service upon an absent resident have been attempted, namely, personal service outside of the state, service at the defendant's residence and service by publication. If the state has authority to give the court jurisdiction of the person of a resident temporarily out of the state, service of process at his residence would seem to constitute due process.[33] This would seem to follow from the general view that such service is valid against a resident who is within the state, and because it is a way reasonably likely to give him notice of the proceedings. The Supreme Court, though being careful not to express a definite opinion on the point, has intimated that such service may be valid under the circumstances stated.[34] Personal service on a resident while outside of the state has been held bad by the Supreme Court of the United States,[35] and by the state courts.[36] Although this is clearly

[32] Huntley v. Baker, 33 Hun. (N. Y.) 578, 580, cited with approval in de Meli v. de Meli, 120 N. Y. 485, 495, and in Teel v. Yost, 128 N. Y. 387, 396. (This is not in conflict with Grubel v. Nassauer, 210 N. Y. 149, where the court refused to enforce a judgment in Germany against a German citizen, who, however, was *domiciled* in New York, where the action was *in personam* and the process was served by publication.) In accord, Sturgis v. Fay, 16 Ind. 429; Henderson v. Staniford, 105 Mass. 504; Fernandez v. Casey and Swasey, 77 Tex. 452; Ouseley v. Lehigh Val. T. and S. D. Co., 84 Fed. 602. FREEMAN ON JUDGMENTS (4th ed.), sec. 570.

[33] Sturgis v. Fay, 16 Ind. 429; Huntley v. Baker, 33 Hun. (N. Y.) 578. This seems to be the effect of Botna Valley St. Bk. v. Silver City Bk., 87 Ia. 479. Two judges in Raher v. Raher, 150 Ia. 511, expressly take this view; three do not express themselves upon this point.

[34] McDonald v. Mabee, 243 U. S. 90.

[35] *Ibid.*

[36] Moss v. Fitch, 212 Mo. 484, overruling Hamill v. Talbott, 72 Mo. App. 22; 81 Mo. App. 210; Raher v. Raher, 150 Ia. 511.

the best method of giving actual notice to an absent resident of the proceedings pending against him, it is held to constitute an attempt to give extra-territorial effect to the mandate of the state court. Service by publication has in one case been held invalid as against an absent resident.[37] In another case it has been held valid.[38] In a third jurisdiction it has been held that a judgment obtained upon such a service is at most voidable by the defendant, and cannot be treated as void by the plaintiff.[39] If the Supreme Court is, as seems to be the case, opposed to service by publication as against a resident defendant who is within the state, *a fortiori* would it be against such service when the defendant is absent from the state. This also is the fair deduction from *McDonald* v. *Mabee*.[40] The English courts have held that a judgment against an absent resident is valid though based upon constructive service if such constructive service is authorized by law.[41]

If a charter is granted by a state to a domestic corporation upon condition that service may be made upon it through some public officer, or by publication, such service being consented to would be good. Aside from any such consent it would seem that the due process clause would require the same sort of service upon a domestic corporation as upon a resident natural person. It has been held that constructive service upon a domestic corporation, which does not have an office in the state, is due process when reasonable in character.[42]

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[37] De La Montanya v. De La Montanya, 112 Calif. 101; three judges dissenting. And see Bernhardt v. Brown, 118 N. C. 700.

[38] Fernandez v. Casey and Swasey, 77 Tex. 452.

[39] Henderson v. Staniford, 105 Mass. 504; Stockwell v. McCracken, 109 Mass. 84.

[40] 243 U. S. 90.

[41] Douglas v. Forrest, 4 Bing. 686 (public proclamation in court, in the market place and on the seashore, according to Scottish law); Becquet v. MacCarthy, 2 B. & Ad. 951 (process served upon a public officer to be forwarded to the defendant in accordance with the law of the colony); Maubourquet v. Wyse, 1 Ir. Rep. C. L. 471 (similar decision as to French judgment).

[42] Town of Hinckley v. Kettle River R. Co., 70 Minn. 105 (service of process upon the Secretary of State with direction to mail a copy to the office or to an officer of the corporation); Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626 (service by publication).